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Commentary read at the “National Stability...” session on 24 August:

The title of my report ["National Stability and Hereditary Transmission of Political and Economic Power"] suggests a far broader treatment of the subject of inherited power than I have actually given. I intended originally, when I submitted the title to the International Commission more than two years ago, to presents a comparative report of how laws of inheritance in several European nations were related to po1itical and economic factors in early modern history. I finally limited the report to just one country, and essentially just to non-noble succession, in the belief that what discovered concerning lineage property, *propres*, in France offers promise of a new insight into a much debated issue of contemporary historiography, the changing social structure of the *ancien régime*, and thus was potentially more interesting to this professional audience than the general summary of primogeniture and entail in early modern times that the report otherwise would have been.

Nevertheless I would like to make now a few comparative observations in line with my continuing research on the problem of inheritance. This will give some perspective on the French problem from the outside, as it were, instead of just from the inside as in my report. I shall comment briefly upon three issues: (1) the concept of *propres* (lineage property); (2) ways of advantaging; (3) fideicommisary and other forms of entail. I shall conclude with a few remarks about the importance of the study of the laws of inheritance for social history.

First, the system of *propres*. It must always be stressed that the system of lineage property originated in and was primarily important for commoner succession, and so must be contrasted with primogenitary and entailed forms of noble succession--at least in France. That succession to *propres* over many generations often ended with families entering the nobility is an important factor all by itself, but it is coincidental to the main issue of how families moved from very modest to very considerable fortunes before any chance of noble status arose.

There were equivalences of *propres* in the laws of Castile, Italy and Germany (to name those of which I am so far aware), but in none of them did lineage property function as in France. In Castile, the medieval term *bienos proprios* is related not so much to the distinction between propres and *acquets*--i.e., lineage property or newly acquired property--as to the distinction between *dominium directum* and *dominium utile*, i.e., between seignorial and usufructory rights over property.

In Italy the *beni parentali* and in Germany the *Eigen* of 16th-century Saxon law were more free from the strictures of the laws of family succession than were French *propres* in that both countries allowed extensive power of testamentary disposition and of fideicommisary or other forms of entail. In all of these non-French cases, moreover, it would be necessary to know (as yet I do not) whether real property other than land and houses was classified as lineage property. There is the distinct possibility that French *propres* enjoy a unique importance because *rentes* and *offices* were classified as real property and this became lineage property when transmitted by hereditary succession.

Second: Advantaging one heir over others. In the French *coutumiers* this took place either by *inter vivos* gifts or by manipulation of the categories of heir and legatee in testaments. There were comparable advantaging devices in the legal systems of other countries. In Catalonia, advantaging was so regularly accomplished by *inter vivos* endowments that the very term for

inheritance, *heredimento,* faded from usage in early modern times.

In Germany, the widespread form of advantaging one heir in commoner successions, the *Anerbenrecht,* was used principally to avoid the parcellizing of a given agricultural unit.

In Castilian law, the *mejora* seems to have allowed commoners to concentrate all forms of wealth principally in one heir. The *mejora* was based on a reduction of the hereditary reserve declared by law, which allowed a correspondingly larger portion to be assigned by the testator. What is more, the *mejora* could be converted into an entail, a commoner's version of the noble *mayorazgo*, if a sufficiently large estate could be assembled for one heir within the rules of the hereditary reserve.

Thirdly: entail, which is the principal form of advantaging known in early modern times. It usually took the form of renewed primogenitary right, and unquestionably it issued from the rules of succession to medieval seigneuries. In general, early modern entail--s*ubstitution, fideicommissum, mayorazgo, majoratus*--is a family proprietary privilege replacing a previously public seigneurial function. The Roman laws of *fideicommissum,* which finally played such a great role in continental entails, were not much used until the 16th century, when they conjoined with the Castilian *mayorazgo* (formalized by the Laws of Toro in 1504). The Laws of Toro immediately influenced Spanish Italy, then all of Italy, then spread to Germany during the later 16th and 17th centuries.

Unlike France, which did not allow entail for commoner estates until the mid-18th century, Spain, Italy and Germany began to allow them for commoners already in the 16th. Still, commoner entails were only important for families which had already accumulated fortunes of nearly-noble dimension. In my view, entail played essentially a negative role in social history--i.e., the preservation of the highest social strata. This function of preserving well-established fortunes is a problem which should be kept separate from the function of such devices as *propres* which served to foster the growth of lesser family fortunes.

The exception to this, if any, would be England, where entails occurred earlier, were statutorily banned sooner, yet survived in practice (in the form of the family settlement)longer than in any other nation. In combination with the full power of making testaments (from the time of Henry VIII onwards) and the general laws of intestacy which called for primogenitary succession to real property, England had the most comprehensive system of any nation to preserve family estates intact. Noble versus non-noble property holdings was not a significant distinction. The English were well aware of the interrelationship between advantaging one heir, perpetuating families over generations, and stabilizing political power. Entail was forbidden formally, however, because of its deadening effect, since it rendered successive generations impotent in the managing of family fortunes. The sly legal device of family settlements which replaced formal entail, in the 17th century, amounted to leading over one generation and then bringing it back into the legal operation later on, that is to say, the overleaped generation was given ownership at the same moment that it had to recommit the estate to another two-generation entail.

This legal fandango of one step backwards, two steps forwards, restrained the legal independence of every generation but at the same time forced each generation in practice to participate in the constant renewal of the entail.

This kind of constantly renewed family involvement in English successions brings to mind the transgenerational family involvement which I have postulated for the *coutumier* system of in France. The laws of the two countries were utterly dissimilar: one called for enforced intestate equal division and allowed little testamentary discretion; the other called for

intestate primogeniture and allowed wide testamentary power; yet quite similar mentalities and possibilities of guarding family fortunes resulted. This oddity should warn us against studying legal structures in isolation from political and economic structures, or of theory isolated from practice. The same legal systems might lead to different practical results, and different systems might lead to practically the same result.

Before any comprehensive comparative theory can be deduced, it will be necessary to find out for every nation whether a distinction between noble and non-noble property was clearly set forth in the law and enforced in practice, and then to see if there were any special commoner rules that assisted the growth of family fortunes--or, what amounts to the same thing, whether there were laws inhibiting such growth which were evaded in practice. This knowledge is a prerequisite for the study of social mobility over many generations.

In my report I have tried to correlate legal, political and economic elements on the level of theory. On the broadest level, it is clear that laws of inheritance are among the most critical elements of any society. They are at the heart of the laws of property. A major differentiation between societies today lies in whether real property can be owned privately or must be held communally--in effect, by an individual or by the body politic as a whole. Before either of these systems became predominant in modern times, ownership of real property was vested chiefly in families considered diachronically--whether of noble fiefs or commoner lineage property. This early kind of family ownership usually restricted transference of property to hereditary succession. The laws of inheritance, therefore, are central not only to transmission of political and economic power, but also to the very mentality of proprietary right in medieval and early modern times. I do believe that one of the great errors of anachronism in modern historiography is to assume that people of two centuries ago and earl had the same attitude towards proprietorship that we have today.

What research has already been done on the history of rules of inheritance in European history has been in the realm of theory, and **so has** not been very useful to social historians. The new techniques of quantitative analysis of archival sources may allow us to track the course of family fortunes over time, but before such investigations are made it is mandatory that the legal/jurisprudential framework be clearly understood.

Law is not the generator as much as the resonator of political and economic aspects of society, and jurisprudence concerning practice serves as a barometer to measure changes in the power structure of society over long periods of time. Along with quantitative methods, therefore, I propose that legal theory and jurisprudence belong in the category of auxiliary disciplines for the new social history.

(Original typescript in "Inheritance, General")